

SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
1 THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947
(302) 856-5257

October 6, 2011

N440 - State Mail
Edward J. Clark
James T. Vaughn Correctional Center
1181 Paddock Road
Smyrna, DE 19977

RE: State v. Edward J. Clark – Case No.’s 0912006119 and 1001018501
Motion for Post Conviction Relief

Dear Mr. Clark:

On May 24, 2011, Edward J. Clark (“defendant”) filed a Motion for Postconviction Relief pursuant to Superior Court Criminal Rule 61 (“Rule 61”).

Pursuant to Rule 61(g), the Court requested that defense counsel respond to the allegations by affidavit and the defendant was given the opportunity to file his Rule 61(g) affidavit in response to his attorney’s affidavit.

Defense counsel had to file her affidavit by September 2, 2011. If Mr. Clark chose to respond he had until October 3, 2011, to do so. As of today, October 6, 2011, the Court has received nothing from the defendant. Therefore, this matter is ripe for decision.

Based upon the record before me; i.e. the transcript of the guilty plea, the plea documents, the Rule 61 motion and the Rule 61(g) affidavit of defense counsel, the Court denies the postconviction motion.

Background

By an indictment the defendant was charged with twelve drug charges and two charges of endangering the welfare of a child. After discovery and the passage of the case through the Track 1 Drug Court calendar, the trial was scheduled for June 14, 2010. At final case review on June 9, 2010, the defendant pled guilty to Delivery of Cocaine, Trafficking in Cocaine, Maintaining a Vehicle, and one count of Endangering the Welfare of a Child. On a separate file he pled guilty to a charge of Failure to Re-register as a Sex Offender. The defendant’s prior record made him habitual offender eligible pursuant to 11 Del.C. §4214(a). The plea agreement recommendation was found to be reasonable and the defendant was sentenced to that which had been negotiated.

The habitual offender statute was applied only to the Delivery of Cocaine charge, whereby the defendant received a sentence of 6 years at Level V. On the trafficking charge he was sentenced to 12 years at Level V, suspended after 2 years for probation at supervision Level III. He also received probation on the other three remaining charges. Therefore, he received a total of 8 years at Level 5, with the remaining Level 5 time being suspended for probation.

On the same day the Court sentenced the defendant on a separate violation of probation as to charges of Rape in the 4th Degree, Reckless Endangering in the 1st Degree, and Non-compliance with Conditions of Bond. This sentence also tracked the recommendation contained in the plea agreement, with the exception that he was discharged as unimproved as to the charge of Non-compliance with Conditions of Bond.

In summary, the defendant received the sentence that was recommended in the plea agreement.

On August 3, 2010, the defendant filed a Motion for Reduction of Sentence, which was denied on August 10, 2010.

The Rule 61 Allegations and Defense Counsel's Rule 61(g) Response

Ground One: The defendant alleges a GPS tracking device was used to track him and there was no warrant, violating his expectancy of privacy. Defendant does not specifically argue that his attorney was ineffective for not moving to suppress, but inferentially that is his claim.

As to all of the ineffective assistance of counsel claims the defendant must allege and prove concrete allegations that his attorney, by error of omission, committed objective mistakes in representing the defendant, which actually caused him prejudice as to his decision to plead guilty. *Strickland v. Washington*, 466 U. S. 668 (1984).

When defense counsel's Rule 61(g) affidavit was filed she requested that it be under seal because of the contents potentially being detrimental to Mr. Clark's safety. Defense counsel details her work on behalf of the defendant, their communications, her assessments, his initial attempts to communicate with the prosecuting authorities without her knowledge, those subsequent developments and finally the plea negotiations.

As to Ground One, defense counsel acknowledges that there existed a viable basis to file a suppression motion concerning the GPS device used by the police. Unfortunately, defense counsel reports that a favorable ruling would have only impacted the failure to re-register charge. It was defense counsel's opinion that the hand-to-hand undercover drug buys involving cell phone communications with the defendant by the State Police undercover officer were not tainted by the GPS device. In other words, the drug sales evidence was independent of other evidence acquired by way of the GPS device. The State had an extremely strong case as to the two drug buys. The State informed the defense that an habitual offender motion would be filed. The defendant and his attorney were heavily invested in negotiating a minimum amount of jail time, hence, the defendant's "communications" with the State as detailed in defense

counsel's affidavit. These "communications" resulted in the plea agreement recommendations made by the State and the defense. Would the defendant have liked less time than the 8 years negotiated? Of course, but that is not now an issue.

Defense counsel also reports that it was a strategic defense strategy not to file a suppression motion as to the GPS device because that would have thrown a monkey wrench into the negotiations, with the defendant's end game being he may have less serious charges thrown out but the more serious charges would remain.

I find the defense counsel effectively and zealously represented her client. He has failed to establish error or prejudice on her part.

Ground Two: This is a generic allegation that he requested a "suppression hearing for favorable evidence." This is fully discussed above.

Ground Three: The defendant noted a discrepancy in the weight of the drugs per the police report, opposed to the lighter weight by the medical examiner's office. Defense counsel explained the usual practice of the police is to weigh the drugs together with the baggies or packaging material. The medical examiner weighs the drugs without the baggies or packaging material. It is common to see a discrepancy and therefore the lower weight by the medical examiner's office was not a basis to seek an expert to re-weigh the drugs.

I find defense counsel's decision to not hire an expert to re-weigh the drugs reasonable. She was not ineffective because of this issue. Also, she states in her affidavit that she explained all of the above to the defendant.

Ground Four: The defendant alleges his defense counsel told him she was overwhelmed by her caseload involving a murder case. Defense counsel specifically denies this allegation. She reports she told the defendant that she had not met with him sooner or responded to his correspondence sooner because of her work. She reports that with 17 years of practicing criminal law she knows how to prioritize what needs to get done and when. She reports that their initial meetings were not productive because she had to get all of the discovery from the State before she could give any meaningful advise. She met with the defendant in person or by video seven times and spoke with him by telephone at least two times.

Considering the detailed accounting of her work on behalf of he defendant, I find there to be no credible basis for this conclusory allegation. He had zealous and effective counsel.

Ground Five: The defendant alleges his attorney coerced him into the plea agreement by threats and by not "exhaustively investigating the defendant's case." Counsel denies this claim. She reports she did warn the defendant of the strength of the State's case as to the drug charges and recommended the plea. Specifically, she wrote to the defendant advising him "I strongly suggest you consider the offer with a recommendation of 8 years so that you limit your jail exposure." Defense counsel reports that she never threatened or even raised her voice in regard to their discussion to accept the plea.

In the guilty plea form the defendant indicated that neither his lawyer or anyone else had threatened or forced him into the plea. He knew he was facing life plus 31 years, with a recommendation of 8 years.

Having told me in the plea colloquy he would tell me the truth as to my questions, the Court is entitled to rely upon his answers that he was not being forced by his attorney or anyone else into entering the plea. He told me he was satisfied with her services. There was a discussion about him wanting certain motions filed, but he acknowledged that she had fully discussed the merits of same with him.

Considering the transcript of the plea colloquy, the plea documents and defense counsel's Rule 61(g) affidavit, I am satisfied that no one forced the defendant into entering the plea on June 9, 2010. It was his decision.

Grounds Six and Seven: Both of these grounds raise the issue that the defendant has mental health issues that resulted in his failure to have been able to make competent decisions from the time of his arrest to the time of his admission of guilt. His lawyer reports that in all of her communications and conferences with him there was never any issue of difficulties in communication or understanding each other. The plea colloquy is evidence of his understanding fully the nature and consequences of his decision to plead guilty. I find that there is no basis for this conclusory claim.

Conclusion

For all of the reasons discussed above, defendant's Motion for Postconviction Relief is denied.

IT IS SO ORDERED.

Very truly yours,

/s/ T. Henley Graves

cc: Prothonotary
John Donahue, Esquire, Department of Justice
Stephanie Tsantes, Esquire